Supreme Court, U.S.
FILED

95 • 861 NOV 13 1995

No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

In the Matter of the Complaint

of

TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability,

Petitioner.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

LE GROS, BUCHANAN & PAUL
ROBERT N. WINDES
2500 Columbia Center
701 Fifth Avenue
Seattle, WA 98104
Phone 206-623-4990
Attorneys for Petitioner Tonquin Fisheries, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

74pp

QUESTION PRESENTED

Whether the doctrine of comparative negligence, the cornerstone of modern maritime law, is displaced by 45 U.S.C. § 53, whenever a violation of an administrative safety regulation is found, and even where the violation was in whole or in part the fault of the seaman on whose behalf suit is brought.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTE 1

STATEMENT 2

A. Facts 2

B. Proceedings Below 4

REASONS FOR GRANTING THE PETITION 7

I. The Ninth Circuit's Decision in this Case Is Based on an Erroneous Interpretation of 45 U.S.C. § 53 9

A. Personal Responsibility is the Standard .. 9

B. Section 53 Does Not Address Comparative Fault 10

C. Congress Did Not Intend to Preclude Comparative Fault 10

D. Congress Intended 45 U.S.C. § 53 To Promote Safety and Compliance with Safety Statutes 12

E. The Ninth Circuit's Interpretation of § 53 is Contrary to Responsible Public Policy and the Intent of FELA 13

F. Section 53 Does Not Address Regulations .. 14

II. The Ninth's Circuit Holding Is Inconsistent with the Holdings of Other Courts Within the Ninth Circuit 15

TABLE OF CONTENTS – Continued

Page

III. The Ninth Circuit's Reliance on Kopczynski and Roy Crook is Misplaced 18

IV. The Court's Reliance on Uncontested Limitation Analysis is Faulty 20

V. The Question Presented Is Important 23

CONCLUSION 22

APPENDIX .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Admiral Towing Company v. Woolen, 290 F.2d 641 (9th Cir. 1961) 13, 16, 17

Bertholf v. Burlington Northern Railroad, 402 F. Supp. 171 (E.D. Wash. 1975) 16

Complaint of Patton-Tully Transp. Co., 797 F.2d 206 (5th Cir. 1986) 20

Continental Oil Co. v. Bonanza Corp., 706 F.2d 1365 (5th Cir. 1983) 20

Dickens v. United States, 815 F. Supp. 913 (E.D. Va. 1993) 9

Farrell Lines v. Jones, 530 F.2d 7 (5th Cir. 1976) 20

Hansen v. Barnard, 270 F. 163 (2d Cir. 1920) 17

Heath v. Matson Navigation Co., 333 F. Supp. 131 (D. Hawaii 1971) 15, 16

The Iroquois, 194 U.S. 240, 48 L.Ed. 955, 24 S.Ct. 640 (1904) 17

Kernan v. American Dredging Co., 355 U.S. 426, 2 L.Ed.2d 382, 78 S.Ct. 394 (1958) 15, 16, 19

Kopczynski v. The JACQUELINE, 742 F.2d 555 (9th Cir. 1984), *cert. denied*, 471 U.S. 1136, 105 S.Ct. 2677 (1984) 15, 18, 19

Mass. Lobstermen's Assoc. v. U.S., 554 F. Supp. 740 (D. Mass. 1982) 17

Matter of Hechinger, 890 F.2d 202 (9th Cir. 1989), *cert. denied*, 498 U.S. 848, 111 S.Ct. 136, 112 L.Ed.2d 103 (1989) 20

TABLE OF AUTHORITIES – Continued

Page

Neal v. Saga Shipping Co., 407 F.2d 481 (5th Cir), *cert. den.* 395 U.S. 986 (1969)..... 15, 16, 19

Page v. St. Louis Southwestern Railway Co., 349 F.2d 820 (5th Cir. 1965)..... 11, 12

The Pennsylvania, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873)..... 5, 7

Pennzoil Producing Co. v. Offshore Exp., Inc., 943 F.2d 1465 (5th Cir. 1991)..... 18

Petition of New England Fish Co., 465 F. Supp. 1003 (W.D. Wash. 1979)..... 13, 16

Roy Crook & Sons, Inc. v. Allen, 778 F.2d 1307 (5th Cir. 1985) 15, 18

San Antonio & A.P.R. Co. v. Wagner, 241 U.S. 476, 60 L.Ed. 1110, 36 S.Ct. 626 (1916)..... 12

Seaboard A.L. Railway v. Horton, 233 U.S. 492 (1942) ....

Sowards v. Chesapeake & O. Ry. Co., 580 F.2d 713 (4th Cir. 1978)..... 12

The Styria, 186 U.S. 1 (1902) 17

Superior Oil Co. v. Trahan, 322 F.2d 234 (5th Cir. 1963)..... 9

United States v. Reliable Transfer Co., 421 U.S. 397, 44 L.Ed.2d 251, 95 S.Ct. 1708 (1975)..... 8, 9, 11

Walsh v. Boston Sand & Gravel Co., 175 F. Supp. 411 (D. Mass. 1959)..... 9

Williams v. Hollywood Marine, 717 F. Supp. 437 (E.D. La. 1989) 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 4

28 U.S.C. § 1333 4

45 U.S.C. § 53 ..... *passim*

46 U.S.C. § 688 ..... 4, 7, 11

46 U.S.C. §§ 181-185 4

46 C.F.R. § 25.25-13 6

46 C.F.R. § 28.250 6

Fed. R. Civ. P. 52(b) 7

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-7) is unreported. The Judgment and Findings of Fact and Conclusions of Law of the district court (App. *infra*, 8-16) are unreported.

JURISDICTION

The court of appeals entered its judgment on August 15, 1995 (App., *infra*, 1). Appellant petitioned for a rehearing en banc on August 28, 1995, which petition is still pending. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE

45 U.S.C. § 53 Contributory negligence; diminution of damages.

> In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such

common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

(Apr. 22, 1908, c. 1949, § 3, 35 Stat. 66.)

STATEMENT

A. Facts

This case arose out of the sinking of the vessel F/V TONQUIN in a storm on October 13, 1991. All crewmembers were rescued except for the vessel's master, Captain Lawrence Tousignant, who is presumed to have drowned.

Captain Tousignant became TONQUIN's master in May or June of 1991, and fished her uneventfully until the incident some five months later.[1] Captain Tousignant was an experienced fisherman, and assumed control over general safety conditions on the vessel, as appropriate for the captain of a vessel.[2] According to the district court findings at trial, there were two Coast Guard violations at the time of the sinking: 1) an inoperative bilge alarm, and 2) the survival suits on board did not have flash lights on them. (App., *infra*, 11)

---

[1] The evidence cited in the following paragraphs, relevant to Tousignant and his actions, remained uncontroverted in the limitation proceeding before the court.

[2] As discussed below, Captain Tousignant's duties regarding safety equipment was not an issue before the trial court in the limitation proceeding, and while some testimony was presented relating Captain Tousignant's duties, the issue of his duties and authority will require further development in later hearings.

Tousignant had access to assistance for repairing components of the vessel's electrical system, from the engineer on the vessel's sister ship, but did not ask for help to have the bilge alarm repaired. On at least one occasion, Captain Tousignant returned to port in order to have the vessel (its winches) repaired, so that he and his crew could continue fishing.

The vessel was at sea when the storm arrived. At some point thereafter, Captain Tousignant decided to stop fishing and try to ride out the storm rather than immediately seek shelter. Captain Tousignant went to bed and left another crewmember at the wheel. The crewmember realized the vessel was in trouble and taking on water when it took a hard list to starboard. Captain Tousignant and the rest of the crew were awakened, and Captain Tousignant broadcasted a mayday.

The crew donned survival suits and deployed the vessel's life raft. Captain Tousignant told the crew to tie themselves to lines attached to the liferaft, which other crewmembers suspected was a line attached to the sinking vessel. While none of the crew complied with the instruction, obviously believing such action to be unwise and unsafe,[3] Captain Tousignant took a line and may have tied himself to it. The vessel went under, and Tousignant's body was never recovered.

---

[3] As one of the crewmembers later stated, "I'm not going to tie myself off to any kind of weight that's sinking, pardner (sic)" (Rhol 36:19-20).

B. Proceedings Below

Tonquin filed for limitation of liability pursuant to 46 U.S.C. § 181-185, in the United States District Court for the Western District of Washington, which is the forum in which the Tousignant family resides, as well as the location of Tonquin's principal place of business. The basis for federal jurisdiction was the district court's original admiralty or maritime jurisdiction under 28 U.S.C. § 1333. The Ninth Circuit Court of Appeals had jurisdiction over this appeal from the United States District Court for the Western District of Washington under 28 U.S.C. § 41 and § 1291.

Shortly before the limitation action was to be tried, and despite the injunction, claimant Ymanda Tousignant filed a claim against Tonquin. Just days before trial, on July 30, 1993, claimant moved the trial court to shorten time and dissolve the stay to permit the filing of an action at law. In her request to dissolve the stay, claimant asked that the court try **only** the issue of Tonquin's right to exoneration from or limitation of liability at the upcoming trial. Counsel stated:

> In this case, as the limitation matter is set for trial on August 2 and the parties are prepared to proceed at that time, the claimant proposes to the court that the limitation issues *only* be tried on August 2, 1993. The claimant should be permitted to file her action at law pursuant to 46 U.S.C. § 688 [Jones Act] and to proceed with her damages claim before a jury.

(App., *infra*, 40) (emphasis added).

The trial court granted claimant's motion, dissolved the stay and ordered "that the issues of limitation of liability *only* will be heard and tried by this court at trial on August 2, 1993" (App., *infra*, 37). Accordingly, the parties prepared for trial on the sole issue of limitation of liability. Neither party addressed issues relating to damages, Captain Tousignant's individual responsibility for any unseaworthy condition found, or comparative negligence issues in the Pretrial Order. Whether, and to what extent that Captain Tousignant may have been responsible for any negligence or unseaworthiness, or regulatory violations, as a managing employee of Tonquin was not before the court, and has never been tried. Because the issue of comparative negligence was reserved for later trial, Tonquin made no effort to put on evidence regarding such issues at the trial.

The issue of a captain's comparative negligence is not an element of the analysis in determining limitation of liability. Despite this fact, the trial court held that Captain Tousignant's estate had proven negligence and unseaworthiness sufficiently to impose prima facie liability in the context of the limitation action. Using its finding that the regulatory violations existed, the trial court then used the rule of *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873), to reverse the burden of proof of causation, and determined that Tonquin had failed to prove that the lack of alarm and survival suit lights were not proximate causes of the sinking, or could not have been the cause of the captain's death.

The district court entered Findings of Fact and Conclusions of Law on February 10, 1994, in the form submitted by the estate of Captain Tousignant (App., *infra*, 8-15).

Despite the pretrial motion of claimant Captain Tousignant's estate that trial be strictly limited to limitation issues, and which motion was granted, and despite the fact that issues other than limitation issues were not even argued at trial, the findings and conclusions of law the estate's counsel submitted were not restricted to the issues of limitation of liability. The findings and conclusions contained the following conclusions:

> 14. Tonquin . . . is liable to the Estate of Lawrence Tousignant for all damages caused by the death of Lawrence Tousignant.
>
> 15. The Estate of Lawrence Tousignant may proceed to a trial by jury on its claim on the issue of damages only. No other issue remains to be determined.

(App., *infra*, 14).

The district court entered its judgment on February 23, 1994, and found, in part, that the survival suits on the vessel (of which it found an adequate number) lacked lights in violation of 46 C.F.R. § 25.25-13, and that the vessel did not have a functioning alarm in violation of 46 C.F.R. § 28.250. The district court denied limitation of liability (App., *infra*, 16). Without taking evidence on the issue of Captain Tousignant's own responsibility for the regulatory violations (or any other conditions) in his role as master of the vessel, the district court went beyond its limitation ruling, invoked 45 U.S.C. § 53, and held that the violations necessarily precluded Tonquin, as a matter of law, from putting on evidence, at the next trial, that Captain Tousignant was wholly or partially responsible for the violations.

On March 8, 1994, Tonquin Fisheries moved to amend the Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52(b) (App., *infra*, 17). Tonquin specifically sought amendment with reference to the Court's implicit ruling prohibiting Tonquin from asserting defenses to the estate's claims for damages, including comparative negligence (App., *infra*, 19-24). The district court denied Tonquin's motion, stating:

> The matter of asserting comparative negligence defenses on the issue of damages was addressed in the parties' earlier arguments on Conclusion of Law 14 and 15. Tonquin may not assert the contributory negligence of Lawrence Tousignant in defense of the damage claim because the Court has found that violation of safety statutes, specifically Coast Guard regulations concerning bilge alarms and lights on survival suits contributed to the sinking of the vessel and/or the death of Lawrence Tousignant. *See* 46 U.S.C. § 688 and 45 U.S.C. § 53.

(App., *infra*, 34-35).

Tonquin filed its Notice of Appeal on April 22, 1994. On August 15, 1995, the Ninth Circuit Court of Appeals affirmed the district court's decision (App., *infra*, 1-7). Petitioner-Appellant petitioned for a rehearing en banc on August 28, 1995.

REASONS FOR GRANTING THE PETITION

The primary legal issue is whether 45 U.S.C. § 53 should be combined with other presumptions (such as that arising under the rule of *The PENNSYLVANIA*, 86

U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873)), to impose strict, and absolute liability by utterly precluding a vessel owner from asserting the defense of comparative negligence, even where its captain who is wholly or partially responsible for the conditions giving rise to liability is the seaman on whose behalf suit is brought. This Ninth Circuit would undermine the foundation of modern maritime tort law as mandated by the United States Supreme Court in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 44 L.Ed.2d 251, 95 S.Ct. 1708 (1975). Moreover, the precedent would not only have the perverse consequence of imposing liability without fault, it would actually allow a seaman to establish liability of a vessel owner based on the seaman's own fault.

The Ninth Circuit's construction of § 53 is not supported by well-reasoned cases, sound policy, or a logical analysis of the statute. Section 53 should not be construed to preclude comparative negligence, as a matter of law, under any circumstances. Even if the Court construes the section to bar comparative negligence under some circumstances, it should not be construed to bar a party from asserting comparative negligence as a defense when the injured party may have violated regulations of which he had a duty to comply and which ultimately led to his death. Particularly, § 53 should not have operated to bar Tonquin from asserting the defense of Captain Tousignant's comparative fault with respect to the regulatory violations at issue.

I. The Ninth Circuit's Decision in this Case Is Based on an Erroneous Interpretation of 45 U.S.C. § 53.

A. Personal Responsibility is the Standard.

Comparative fault is the cornerstone of modern maritime law. Courts sitting in admiralty have long recognized that each party is to bear responsibility for its own conduct. A seaman's damages are appropriately reduced by the percent by which his injury is attributable to his own conduct or fault, even if that means diminishment of the recovery to nothing. That was the standard for seaman's personal injury cases long before the United States Supreme Court mandated such a result for maritime cases generally. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 407, 44 L.Ed.2d 251, 95 S.Ct. 1708 (1975); *see also Dickens v. United States*, 815 F. Supp. 913, 918-19 (E.D. Va. 1993) (recovery reduced by 100%); *Williams v. Hollywood Marine*, 717 F. Supp. 437, 446 (E.D. La. 1989) (recovery for seaman experienced in handling hose equipment and yet who negligently pointed hose toward himself was reduced by 50%); *Superior Oil Co. v. Trahan*, 322 F.2d 234, 236-37 (5th Cir. 1963) (although seaman established negligence, unseaworthiness and proximate cause, seaman's award was appropriately reduced by 75%, for seaman's own negligence); *Walsh v. Boston Sand & Gravel Co.*, 175 F. Supp. 411, 413 (D. Mass. 1959) (seaman's negligence in stepping in bight of a line and in paying out an excessive amount of line justified reduction of recovery by 70%, although vessel was unseaworthy because improper line was supplied).

Particularly where, as here, the decedent as master of the vessel, had responsibilities for complying with safety

regulations, a finding of significant comparative negligence must be considered. Any argument that the decedent should be entitled to avoid all responsibility for his own conduct, solely because the trial court determined that a regulatory violation existed, comports with neither well-reasoned precedence nor logic.

B. Section 53 Does Not Address Comparative Fault.

The plain language of § 53 does not bar the assessment of comparative fault. Section 53 states, in pertinent part:

> "[n]o such employee who may be injured . . . shall be held to have been guilty of **contributory negligence** in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury. . . . "

45 U.S.C. § 53 (emphasis added). The section, by its very terms, addresses only contributory negligence, not comparative fault.

C. Congress Did Not Intend to Preclude Comparative Fault.

The lower court's construction of § 53, that Captain Tousignant's comparative fault may not be assessed regardless of his role in creating or allowing any regulatory violations while he was in command of the vessel, is inconsistent with the section's language. Particularly in

the context of maritime law, § 53 should not be construed as broadly as the Ninth Circuit has chosen to read it.

Both FELA and the Jones Act were enacted in a different era, when contributory negligence served as a complete bar to recovery and the Coast Guard's regulatory scheme at issue here did not exist.[4] In the last half century courts generally have adopted comparative negligence as the cornerstone of tort law, and the United States Supreme Court has imposed comparative negligence on all aspects of admiralty. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 407, 44 L.Ed.2d 251, 95 S.Ct. 1708 (1975). Given that comparative, rather than absolute, liability is the law of the land, the court's determination that § 53 should be construed so as to impose absolute liability, in an admiralty case, was error.

The Fifth Circuit discussed Congress' intent in adopting § 53 in *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820, 824 (5th Cir. 1965). In *Page*, the Fifth Circuit opined:

> Thus the purpose [of adopting of § 53's ban of contributory negligence] is to accord damages where the injuries are caused wholly from the negligence of the railroad or where caused partly by its negligence and partly by action of others. The other would, of course, include the injured worker too. The object was to free this new legislatively created right [to recover for

---

[4] Section 3 of the Federal Employers' Liability Act, 45 U.S.C. § 53, was enacted in 1908; the Jones Act, 46 U.S.C. § 688, *et seq.* dates from 1915.

> the negligence of fellow servants] of the common law defenses and refinements **and to supply in its stead a simplified structure in which damages would be borne by the railroad and the injured worker in proportion to their respective faults.**

Page, 349 F.2d at 824 (emphasis added). Thus, the Fifth Circuit has observed that Congress' intent in enacting § 53 was not to prevent the application of the doctrine of comparative negligence.

D. Congress Intended 45 U.S.C. § 53 To Promote Safety and Compliance with Safety Statutes.

The clear intent of the section was to promote compliance with safety statutes enacted for the safety of employees, which is the general goal of FELA. *San Antonio & A.P.R. Co. v. Wagner*, 241 U.S. 476, 481, 60 L.Ed. 1110, 36 S.Ct. 626 (1916); *Sowards v. Chesapeake & O. Ry. Co.*, 580 F.2d 713, 714 (4th Cir. 1978). It is illogical and inconsistent with the manifest intent of FELA, including § 53, to interpret it in a manner that relieves a managing employee from his responsibility for ensuring compliance with regulations.

Fortunately, there is no need to interpret § 53 to mandate such a perverse result. The second part of the section (after the colon, and beginning with the word "*Provided*"), applies only where the "common carrier" (employer), rather than the employee, is the entity responsible for the violation of a statute enacted for the safety of employees. To the extent that the employee was responsible for the violation, the section, by its very

terms, would not preclude the employee from being held partially or wholly at fault, and any recovery should be reduced accordingly.

E. The Ninth Circuit's Interpretation of § 53 is Contrary to Responsible Public Policy and the Intent of FELA.

It defies all rational policy considerations to read § 53 so broadly as to use the violation of a regulation to preclude comparative negligence, as a matter of law, and allow the estate of the very person whose duties included conforming to the regulation to fully recover, despite the deceased's dereliction of duties.

The Ninth Circuit's determination that liability should be imposed on Tonquin, without defense against Captain Tousignant's estate, gave the estate a windfall. The Ninth Circuit should not have ignored the discussions about personal responsibility set forth in Judge Hamley's dissent in *Admiral Towing Company v. Woolen*, 290 F.2d 641, 652 (9th Cir. 1961), cited with approval in *Petition of New England Fish Co.*, 465 F. Supp. 1003 (W.D. Wash. 1979). A person should be responsible for his own conduct in an action brought by or for himself.

The Ninth Circuit's decision to impose absolute liability does nothing to promote safety, the goal of FELA and of the Coast Guard regulations (which regulations the Court used to preclude Tonquin from asserting defenses based on Captain Tousignant's conduct). The Court's disposition of this matter provides no incentive for future captains or supervisory personnel to follow regulations to ensure safe conditions at sea, as they or

their survivors will not be held responsible for their own actions or inaction. Nor will the decision alter the conduct of vessel owners. Vessel owners must necessarily rely on the masters of their vessel to carry out the safety management responsibilities with which they have been entrusted.

The Ninth Circuit's erroneous construction of § 53 is illustrated by the rigidity of the rule the court adopted. Under the court's holding, a vessel owner who retains a captain who chooses to remove fire extinguishers, would be liable to the captain's estate, without diminution for comparative fault, if the captain was killed in a fire aboard the vessel. A decision that mandates such extreme results should not be allowed to stand.

F. Section 53 Does Not Address Regulations.

In this case, the defendant was only found to have violated a regulation promulgated by the Coast Guard, a mere agency of the Executive Branch. Section 53 addresses only a "statute enacted" by Congress. A statute is by definition only a law enacted by a legislative body, which the Coast Guard is not. No statute was violated in this case. This clear distinction should render § 53 inapplicable to this case.

II. The Ninth Circuit's Holding Is Inconsistent with the Holdings of Other Courts Within the Ninth Circuit.

Courts within the Ninth Circuit have not applied 45 U.S.C. § 53 to operate as a complete bar from considering comparative fault, and are generally reluctant to allow persons to completely escape responsibility for their own conduct. Despite such precedent, the Ninth Circuit erroneously held that § 53 precludes a vessel owner from asserting the defenses of comparative negligence and Primary Duty even where the complaining party was responsible for the conditions giving rise to liability.

Heath v. Matson Navigation Co., 333 F. Supp. 131 (D. Hawaii 1971), involved an injury to a crewmember, not responsible for the condition that caused his injury. The seaman moved for summary judgment, arguing that the shipowner was precluded from asserting comparative negligence, because of the existence of regulatory violations. The seaman cited *Kernan v. American Dredging Co.*, 355 U.S. 426, 2 L.Ed.2d 382, 78 S.Ct. 394 (1958), and *Neal v. Saga Shipping Co.*, 407 F.2d 481 (5th Cir.), *cert. den.* 395 U.S. 986 (1969).[5] The court denied the seaman's motion, based on causation issues and because the court did not agree that § 53 precluded comparative negligence as a matter of law. In *Heath*, the court correctly noted that *Kernan*'s holding was limited to the concept of negligence *per se*,

---

[5] Both *Kernan* and *Neal* were heavily relied upon by the prevailing party below. Additionally, *Kopczynski* and *Roy Crook*, the two primary cases upon which the Ninth Circuit based its ruling, are based upon erroneous constructions of *Kernan* and *Neal*.

not the preclusion of comparative negligence. The *Heath* court disagreed with and distinguished *Neal*. *Neal*'s dependence on *Kernan* for a holding on comparative negligence (rather than negligence *per se*) was inaccurate. Also, *Neal* involved a longshoreman, and its discussion of FELA's impact on the Jones Act was complete dicta. *Heath*, 333 F. Supp. at 136. The Heath court declined to prohibit the employer from raising the defense of contributory negligence, despite the violation of a Coast Guard regulation. *Id.* at 136.

In *Bertholf v. Burlington Northern Railroad*, 402 F. Supp. 171 (E.D. Wash. 1975), the court was similarly reluctant to abandon comparative negligence, even in a non-admiralty case. There an injured railway employee brought action under FELA and sought a determination that his recovery not be diminished by his own conduct. The court refused to interpret § 53 to impose absolute liability on the employer where a safety statute other than one within the Safety Appliance Act had been violated. *Bertholf*, 402 F. Supp. at 172-73. Like the court in *Heath*, the *Bertholf* court distinguished *Kernan* and discredited *Neal*. *Id.* at 173.

Other opinions rendered by courts within the Ninth Circuit have shown similar reluctance to abandon the concept of holding persons responsible for their own conduct, without at least allowing inquiry into the facts. *See Admiral Towing Company v. Woolen*, 290 F.2d 641, 652-53 (9th Cir. 1961) (Circuit Judge Hamley's partial dissent); *Petition of New England Fish Co.*, 465 F. Supp. 1003, 1008-09 (W.D. Wash. 1979) (recovery for the death of the vessel's master was to be reduced by his own culpability, fifty percent).

In *Admiral Towing*, a vessel sank and her two person crew, composed of the captain and a very young, inexperienced hand, were lost. The court affirmed the denial of the vessel owner's petition for limitation of liability, based on the vessel owner's privity to the captain's negligence and vessel's unseaworthiness in sailing with an incompetent crew. While the case did not present the issue with which this court is presented, i.e., whether the recovery of the captain's survivors was immune from diminution, Circuit Judge Hamley's partial dissent pointed out a distinction that should rationally have been drawn between the grounds for liability to the different seamen. Judge Hamley noted that, as to the captain, liability should not have been based on negligence, because the captain's own negligent hiring created the circumstances for the incident in the first place. *Id.* at 652-53. The Ninth Circuit Court erred in abandoning such principles.

The opinions discussed above illustrate that the "employee" identified in 45 U.S.C. § 53 was not meant to include a vessel's master, particularly in situations such as between Captain Tousignant and Tonquin. The relationship of a vessel's master or captain to the vessel's owner is that of an agent to principal, and includes the obligations of a fiduciary. *Hansen v. Barnard*, 270 F. 163, 165 (2d Cir. 1920); *Mass. Lobstermen's Assoc. v. U.S.*, 554 F. Supp. 740, 742-43 (D. Mass. 1982). The master must act with the utmost attention in all of his dealings affecting the vessel. *The Styria*, 186 U.S. 1, 9, 45 L.Ed. 719, 21 S.Ct. 516 (1902). With respect to his crewmembers, the master is responsible for their safety, and stands in *loco parentis* to them. *The Iroquois*, 194 U.S. 240, 247, 48 L.Ed. 955, 24

S.Ct. 640 (1904). FELA should not be mechanically applied in favor of a vessel's captain, to automatically insulate him from his own conduct. This is consistent with the embracement of the comparative negligence rule by courts sitting in admiralty. *See Pennzoil Producing Co. v. Offshore Exp., Inc.*, 943 F.2d 1465, 1469, 1471-73 (5th Cir. 1991).

In summation, no law mandates the result that the Ninth Circuit reached, that 45 U.S.C. § 53 eliminates any assessment of Captain Tousignant's own conduct because violations of regulations existed before and during the time the Captain was in command of the vessel. Cases decided by the District Courts sitting in the Ninth Circuit support the contrary result. The issue of Captain Tousignant's comparative fault (regarding not only the safety issues aboard the vessel generally, but also his own conduct in tying himself off to a line while the vessel was sinking, as well as other issues) should be fully presented and argued before the finder of fact. Surely, Tonquin should not be precluded, as a matter of law, from raising Captain Tousignant's comparative culpability solely because the trial court, in the context of a limitation action, determined that Coast Guard regulations pertaining to high water alarms and lights on the survival suits were violated before and during the time Captain Tousignant commanded the vessel.

III. The Ninth Circuit's Reliance on *Kopczynski* and *Roy Crook* is Misplaced.

The Ninth Circuit's heavy reliance on *Kopczynski v. The JACQUELINE*, 742 F.2d 555 (9th Cir. 1984), *cert. denied*,

471 U.S. 1136, 105 S.Ct. 2677 (1984) and on *Roy Crook & Sons, Inc. v. Allen*, 778 F.2d 1037 (5th Cir. 1985), was misplaced.

In its Memorandum, the Ninth Circuit erroneously cites *Kopczynski* in support of it holding. (App. *infra*, 6). The question of when a court might use § 53 to eliminate assessment of the comparative fault of a vessel's master, charged with responsibility over the vessel's safety, was not before the court in *Kopczynski*. Moreover, there the court rejected a seaman's argument that his comparative negligence should not be allowed to reduce his damage award. The court declined to decide when, if ever, the violation of a safety statute or regulation might preclude assessment of comparative negligence. *Kopczynski*, 742 F.2d at 558.

In discussing comparative negligence, the only support the *Kopczynski* court found for the proposition that § 53 could be used to bar comparative negligence was *Neal v. Saga Shipping Co.*, 407 F.2d 481 (5th Cir.), *cert. denied*, 395 U.S. 986 (1969), a longshore case, and *Neal's* inaccurate reference to *Kernan*. As discussed above, *Kernan* contained **no** holding on the issue of comparative negligence, and the *Neal* court's use of the case for a holding on comparative fault was error.

The Ninth Circuit's reliance on *Roy Crook* is no more persuasive. There the Fifth Circuit adopted the faulty reasoning that it had previously rendered in *Neal*. This Court need not, and should not, perpetuate the Fifth Circuit's mistake.

IV. The Ninth Circuit's Reliance on Uncontested Limitation Analysis is Faulty.

The Ninth Circuit cites to uncontested portions of the district court's decision to support its determination regarding primary duty (App., *infra*, 1-7). Using careless analysis, the court erroneously equates the imposition of liability for conduct as against third parties with a person's responsibility for his own conduct.

Denial of limitation of liability is based on a determination that the vessel owner was in privity to or had knowledge of the bases for liability, negligence or unseaworthiness. *Farrell Lines v. Jones*, 530 F.2d 7, 10 (5th Cir. 1976). Privity or knowledge do not require a finding that the owner had actual knowledge. *Matter of Hechinger*, 890 F.2d 202, 207 (9th Cir. 1989), *cert. denied*, 498 U.S. 848, 111 S.Ct. 136, 112 L.Ed.2d 103 (1989); *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1376 (5th Cir. 1983). Nor do the elements of privity and knowledge require any determination that the vessel owner had a duty to act apart from the duty of the master of its vessel. *Complaint of Patton-Tully Transp. Co.*, 797 F.2d 206, 211-12 (5th Cir. 1986).

The findings and conclusions of the district court which were uncontested for the purposes of the appeal, i.e., that a violation of a Coast Guard regulation within the owner's privity and knowledge had occurred, were undisputably rendered in the context of limitation of liability – whether violations of regulations for which Captain Tousignant was responsible and/or had knowledge could be imputed to Tonquin. The determinations of privity and knowledge resolved nothing on the question

of whether Captain Tousignant's breach of his primary duty and/or his comparative fault in allowing the violations to exist and in tying himself to a sinking ship may be assessed in a proceeding to determine what, if any, recovery his estate should have against the vessel owner. The Ninth Circuit's reliance on the district court's privity and knowledge findings was error.

V. The Question Presented Is Important.

The Ninth Circuit's holding in this case effectively decimates the comparative negligence doctrine out of existence and creates a situation where the negligent party (or his estate) financially benefits from the negligent party's negligence. Section 53 was not intended to provide negligent parties with a shield to prevent some portion of liability from being placed on the parties, such as Captain Tousignant, who have a duty to bring vessels into compliance with safety regulations, but nevertheless violate the safety regulations. Such a ruling is inconsistent with the most basic principle of modern tort law, which attempts to place the responsibility on the negligent parties as a matter of policy. Additionally, the Ninth Circuit's ruling does not further the safety concerns that are behind § 53 and FELA. Rather, parties are not encouraged to exercise care as they are ultimately not held responsible for their actions.

CONCLUSION

The Ninth Circuit erred in its analysis of precedence, as a matter of statutory construction, in its assessment of policy considerations, and in blurring the logical distinctions between findings made in the context of a limitation action with factual issues to be decided in subsequent proceedings. Section 53 should not be construed so as to preclude assessment of comparative negligence ever, and particularly in the situation presented here.

The petition for writ of certiorari should be granted.

DATED this 13th day of November, 1995.

Respectfully submitted,

LE GROS, BUCHANAN & PAUL
ROBERT N. WINDES
Attorneys for Petitioner
Tonquin Fisheries, Inc.
Columbia Center, Suite 2500
701 Fifth Avenue
Seattle, WA 98104-7051
(206) 623-4990

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington Corporation, owner of the F/V Tonquin, official no. 529425 for exoneration from or limitation of liability, Petitioner-Appellant, v. EVELYN WARD, Mother of Lawrence J. Tousignant, Captain of the Above-Named Vessel; YMANDA TOUSIGNANT as personal representative of the estate of Lawrence Tousignant, Defendants-Appellees.	No. 94-35422 D.C. No. CV-92-128D(M) MEMORANDUM* (Filed Aug. 15, 1995)

Appeal from the United States District Court
for the Western District of Washington,
Walter T. McGovern, District Judge, Presiding

Argued and Submitted July 21, 1995
Seattle, Washington

* This memorandum disposition is not appropriate for publication and may not be cited to except as provided by Ninth Circuit Rule 36-3.

Before: NOONAN and HAWKINS, Circuit Judges, and LEW, District Judge.**

Tonquin Fisheries, Inc. ("Tonquin") appeals from the district court's findings of fact and conclusions of law rendered after trial of the limitation of liability action below. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I.

This limitation of liability action arises out of the sinking of the vessel F/V Tonquin on October 13, 1991. All crew members except the vessel's captain, Lawrence Tousignant, were rescued from the vessel and survived. Captain Tousignant is presumed to have drowned.

On January 29, 1992, Tonquin Fisheries, the owner of the F/V Tonquin, filed a petition in admiralty for limitation of liability pursuant to 46 U.S.C. App. §§ 183 and 185 and Supplemental Rule F of the Federal Rules of Civil Procedure. In its petition, Tonquin contended that its vessel was seaworthy, that it was free from negligence with regard to the sinking or in the alternative, that it had no knowledge of any unseaworthiness or negligence. Thus, Tonquin contended that it was entitled to limit its liability for the sinking of the vessel to the value of its interest in the vessel. *See* 46 U.S.C. App. § 183.[1]

** Hon. Ronald S.W. Lew, United States District Judge for the Central District of California, sitting by designation.

[1] Section 183 provides, in pertinent part,

(a) The liability of the owner of any vessel, . . . for any . . . loss, damage, or injury by collision,

Following a bench trial of the limitation action, the district court, on February 10, 1994, issued its findings of fact and conclusions of law. The court ruled that because certain regulatory safety violations attributable to Tonquin caused Captain Tousignant's death, Tonquin would not be permitted to limit its liability. On April 1, 1994, the district court issued an order denying Tonquin's motion to amend the findings of fact and conclusions of law.

The district court's determination that Tonquin could not limit its liability is not challenged on appeal. Rather, Tonquin's appeal is limited to certain findings of fact and conclusions of law. Specifically, Tonquin challenges the district court's finding number eighteen, that during the months before the sinking of the F/V Tonquin, Tonquin Fisheries and its principal stockholder, Burton Parker, were in extreme financial distress and were unable to purchase the material or labor necessary to make the vessel safe and seaworthy. ER 83 at 4. Tonquin also challenges conclusions of law numbers fourteen and fifteen, holding that Tonquin Fisheries would be liable to the estate of Captain Tousignant ("the estate") for all damages arising from his death and that a later trial on the

---

> or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. App. § 183. Title 46 U.S.C. § 185 and Supplemental Rule F, Fed. R. Civ. P., provide the procedural rules through which a vessel owner may bring a limitation action.

estate's claims against Tonquin would be limited to the issue of damages.

II.

We review an admiralty trial court's factual determinations for clear error. *Havens v. F/T Polar Mist*, 996 F.2d 215, 217 (9th Cir. 1993); *Newby v. F/V Kristen Gail*, 937 F.2d 1439, 1441 (9th Cir. 1991). Tonquin challenges the district court's finding number eighteen, claiming that evidence in the record of $40,000 to $100,000 being spent annually on maintenance of the F/V Tonquin indicates that the finding was clear error.

We find evidence in the record to support the district court's finding regarding the financial position of Tonquin Fisheries and its primary stockholder and thus affirm the district court's finding. While the evidence cited by Tonquin does support an argument that substantial amounts of money had, at one time, been spent on maintenance of the F/V Tonquin, other testimony supports the finding that in the months before the sinking of the vessel, Tonquin and Burton Parker were in a weak financial position. *See, e.g.*, RT 97, 98, 236; SER 273, 274. The district court's finding of fact eighteen shall therefore be **AFFIRMED.**

III.

An admiralty trial court's conclusions of law are reviewed de novo. *Havens*, 996 F.2d at 217; *Newby*, 937 F.2d at 1441. Likewise, a district court's construction of a statute is a question of law reviewed de novo. *United*

States v. Louisiana-Pacific Corp., 754 F.2d 1445, 1447 (9th Cir. 1985).

Tonquin contends that the district court's conclusions of law numbers fourteen and fifteen, which act to preclude it from raising issues of Captain Tousignant's comparative fault and primary duty, were rendered in error. Tonquin argues that the conclusions are an inaccurate interpretation of the law and moreover, that the issues were not properly before the district court in the limitation action.

We find the district court's conclusions to be a proper application of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 53 (incorporated into seaman's Jones Act claims by 46 U.S.C. § 688). Section 53 provides:

> In all actions . . . brought . . . to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 53.

In unchallenged portions of the district court's findings and conclusions, it held that violations of Coast Guard safety regulations were within the knowledge and

privity of Tonquin and its managing agents and that such violations were a proximate cause of Captain Tousignant's death. ER 83 at 4-6 (conclusions of law 1(a), 1(b), 2, 7). These findings and conclusions were necessary components of the district court's limitation analysis. *See Matter of Hechinger,* 890 F.2d 202, 207 (9th Cir. 1989) (in a limitation action, the court must determine what acts of negligence or unseaworthiness caused the accident), *cert. denied,* 498 U.S. 848, 111 S. Ct. 136 (1990).

Moreover, from these findings and conclusions flows the district court's determination under Section 53 that Tonquin would be liable to the estate for all damages arising out of Captain Tousignant's death and that Tonquin would be precluded from raising issues of Tousignant's comparative negligence. *See Kopczynski v. The Jacqueline,* 742 F.2d 555, 558 (9th Cir. 1984) (under Section 53 "comparative negligence[] may not be considered 'in any case where the violation by [the employer] of any statute enacted for the safety of employees contributed to the injury or death of such employee' "), *cert. denied,* 471 U.S. 1136, 105 S. Ct. 2677 (1985); *see also Roy Crook & Sons, Inc. v. Allen,* 778 F.2d 1037, 1039-41 (5th Cir. 1985).

Tonquin's argument that it should not be precluded from arguing issues of Captain Tousignant's primary duty is likewise unpersuasive. As part of its uncontested limitation analysis, the district court found that it was Tonquin's duty to equip its vessel with bilge alarms and lighted survival suits. ER 83 at 5 (conclusions of law 3(a), 3(b)). While Captain Tousignant may have *shared* this duty, the district court's finding renders the primary duty rule inapplicable. That rule only applies when the shipowner is not at fault and the seaman's own failure to

perform a "specific positive duty" was the *sole* cause of his death. *California Home Brands, Inc. v. Ferreira*, 871 F.2d 830, 836 (9th Cir. 1989); *Kendrick v. Illinois Central Gulf R.R.*, 669 F.2d 341, 344 (5th Cir. 1982).

Finding the district court's preclusion of issues of Captain Tousignant's comparative fault and primary duty to be a correct application of the law, the district court's conclusions of law fourteen and fifteen are **AFFIRMED.** We reject Tonquin's argument that Section 53 should have a different application in the context of claims made by a ship's captain. This argument has no foundation under the statute. *See Roy Crook & Sons, Inc. v. Allen*, 778 F.2d 1037, 1043 (5th Cir. 1985) (finding no exceptions to Section 53's application to the comparative fault of a ship's captain). Moreover, no error or prejudice can be attributed to the district court's preclusion of comparative fault and primary duty in the context of a limitation of liability action. Such preclusion flows directly from the issues necessarily determined by the district court in its limitation of liability analysis. For the foregoing reasons, the district court's decision is

AFFIRMED.

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-0128D(M) FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed Feb. 10, 1994)

This matter was tried to the Court sitting without a jury on August 2 and 3, 1993. Having considered the testimony presented and the exhibits admitted, the Court finds and rules as follows:

I. FINDINGS OF FACT

1. The F/V TONQUIN was a 110 foot stern trawler of 199 gross tons and 142 net tons bearing official number 529425.

2. The F/V TONQUIN was a wooden hulled vessel built in approximately 1943.

3. The F/V TONQUIN was owned and operated by Tonquin Fisheries, Inc. The corporate president and primary stockholder of Tonquin Fisheries, Inc. is Burton

Parker. Other managing agents at the time of the sinking were the corporate secretary, Eben S. Parker and the business manager, Dyann Provenzano.

4. On October 13, 1991, the F/V TONQUIN was fishing approximately 50 miles off the south coast of Kodiak, Alaska.

5. Between 2:30 and 3:00 a.m. on October 13, 1991, the F/V TONQUIN sank.

6. At the time of its sinking, the F/V TONQUIN had five persons aboard, one of whom was the Captain, Lawrence Tousignant.

7. The body of Lawrence Tousignant has never been recovered. The court finds that he drowned as a proximate result of the sinking of the F/V TONQUIN.

8. A cause of the sinking was the entry of water through the stern of the vessel and the lack of watertight and structural integrity of the vessel's hull at that point.

9. At the time of its sinking, the F/V TONQUIN had many leaks in the stern of the vessel such that it lacked watertight and structural integrity and was unseaworthy. Actual knowledge of the structural defects in the vessel could have been obtained through a reasonable inspection of the vessel. Burton Parker, the corporate president, was onboard the TONQUIN during the days immediately prior to its last voyage during October of 1991. He knew or should have known of the structural defects in the F/V TONQUIN. His knowledge is chargeable to the corporate vessel owner, Tonquin Fisheries, Inc.

10. At the time of the sinking, the F/V TONQUIN did not have an operating bilge alarm or high water alarm anywhere onboard.

11. As of the end of May, 1991, there was no operating bilge alarm because Steve Parker, Tonquin Fisheries, Inc.'s corporate secretary and then skipper of the F/V TONQUIN, and a crew member, Robert Steinman, yanked out the wires of the bilge alarm. They yanked out the wires over frustration at its going off inappropriately and unrelated to the water level in the spaces of the vessel. There is no evidence that the bilge alarm was ever repaired before the last voyage of the F/V TONQUIN.

12. At the time of its sinking, the F/V TONQUIN had no bilge alarm whatsoever in the lazarette or in the aft fish hold, spaces subject to flooding from sea water.

13. Tonquin Fisheries, Inc., through its corporate managing agents, had actual knowledge of the absence of a functioning bilge alarm.

14. At the time of its last voyage, the F/V TONQUIN had a sufficient number of survival suits for all persons onboard, i.e., five or more survival suits onboard. All persons onboard in fact donned a survival suit before the sinking of the vessel.

15. None of the survival suits onboard was equipped with a light.

16. The Court finds the testimony of Craig Lynch, the search and rescue expert, credible and reliable. There would have been much greater probability of detection of the skipper and crew had they received early warning from the bilge alarm that the vessel was taking on water

and was sinking, or had they been wearing survival suits equipped with lights. There would have been much greater likelihood of saving the vessel from sinking had there been an earlier warning from the bilge alarm that the vessel was taking on water.

17. Tonquin Fisheries, Inc. failed to exercise reasonable care to maintain and repair the F/V TONQUIN to keep it in a seaworthy condition.

18. During the months in 1991 before the sinking of the F/V TONQUIN, Tonquin Fisheries, Inc. and its principal stockholder and president, Burton Parker, were in extreme financial distress. Tonquin Fisheries, Inc. did not provide adequate funds to purchase materials or labor to make the F/V TONQUIN safe and seaworthy, or to adequately and properly maintain the vessel.

II. CONCLUSIONS OF LAW

1. The F/V TONQUIN was unseaworthy at the time of its last voyage in the following ways.

a. It had no functioning bilge alarm in the machinery space and no bilge alarm in the lazarette or other spaces subject to flooding from sea water, all in violation of Coast Guard regulation 46 CFR §26.250.

b. The survival suits onboard were not equipped with lights in violation of 46 CFR §25.25-13.

c. The vessel lacked watertight and structural integrity. It had leaks through the hull in the stern.

2. The unseaworthiness of the vessel was within the knowledge and privity of Tonquin Fisheries, Inc. and its

managing agents Burton Parker, Eben S. Parker, and Dyann Provenzano.

3. The plaintiff, Tonquin Fisheries, Inc., and its managing agents Burton Parker, Eben S. Parker, and Dyann Provenzano were negligent in the following ways:

a. In violation of the statutory duty to provide required bilge or high water alarms in the lazarette, machinery space and other spaces subject to flooding by sea water under Coast Guard regulation 46 CFR §26.250.

b. In failing to properly equip the survival suits onboard with lights in violation of the statutory duty pursuant to Coast Guard regulation 25.25-13.

c. In failing to properly maintain and repair the vessel and to provide adequate funds obtain materials and labor to make the F/V TONQUIN safe and seaworthy.

4. The unseaworthiness of the vessel within the knowledge and privity of Tonquin Fisheries, Inc. and its managing agents and the negligence of Tonquin Fisheries, Inc. through its managing agents all constitute fault on the part of the owner of the vessel.

5. The unseaworthiness of the vessel in that it was structurally unsound and lacked watertight integrity was a proximate cause of the sinking of the vessel and the death by drowning of Lawrence Tousignant.

6. The owner of the vessel, Tonquin Fisheries, Inc., failed to meet its burden of demonstrating that the unseaworthiness of the vessel due to a violation of Coast Guard regulations concerning high water alarms was not

a proximate cause of the sinking. E.g., *Walston v. Lambertson*, 349 F.2d 660, 663 (9th Cir. 1965); *Admiral Towing Co. v. Woolen*, 290 F.2d 641, 650 (9th Cir. 1961).

7. The defendant failed to carry its burden of proof pursuant to *The PENNSYLVANIA* Rule enunciated in *The PENNSYLVANIA*, 88 U.S. 125 (1974) that the violation of Coast Guard regulation concerning bilge alarms "could not have been" one of the causes of the sinking of the vessel or the death of Lawrence Tousignant.

8. Accordingly, the Court concludes that the unseaworthiness of the vessel in failing to have adequate and functioning high water alarms in violation of Coast Guard regulations was a proximate legal cause of the sinking of the vessel and the death of Lawrence Tousignant.

9. The owner of the vessel, Tonquin Fisheries, Inc., failed to meet its burden of demonstrating that the unseaworthiness of the vessel due to a violation of Coast Guard regulations concerning lights on survival suits was not a proximate cause of the death of Lawrence Tousignant. E.g. *Walston v. Lambertson*, 349 F.2d 660, 663 (9th Cir. 1965); *Admiral Towing Co. v. Woolen*, 290 F.2d 641, 650 (9th Cir. 1961).

10. The defendant failed to carry its burden of proof pursuant to *The PENNSYLVANIA* Rule enunciated in *The PENNSYLVANIA*, 88 U.S. 125 (1974) that the violation of Coast Guard regulation concerning lights on survival suits "could not have been" one of the causes of the death of Lawrence Tousignant.

11. Accordingly, the Court concludes that the unseaworthiness of the vessel in failing to have adequate and functioning lights on survival suits in violation of Coast Guard regulations was a proximate legal cause of the death of Lawrence Tousignant.

12. The unseaworthiness of the vessel and the negligence of Tonquin Fisheries, Inc. and its managing agents were in the knowledge and privity of the owner of the F/V TONQUIN.

13. Tonquin Fisheries, Inc.'s petition for exoneration from or limitation of liability is denied and dismissed.

14. Tonquin Fisheries, Inc. is liable to the Estate of Lawrence Tousignant for all damages caused by the death of Lawrence Tousignant.

15. The Estate of Lawrence Tousignant may proceed to a trial by jury on its claim on the issue of damages only. No other issue remains to be determined.

16. The order of this Court dated January 31, 1992 enjoining prosecution of any action against the plaintiff arising out of the sinking of the F/V TONQUIN is hereby dissolved. Claimant may file her claim on the issue of damages in any court otherwise having jurisdiction.

17. The Clerk of the Court shall enter judgment accordingly. Claimant shall be awarded her costs.

DONE IN OPEN COURT this 10th day of February 1993.

/s/ Walter T. McGovern
WALTER T. McGOVERN
United States District Judge

Presented by:

FURY BAILEY

/s/ C. Steven Fury
C. STEVEN FURY
Counsel for Claimant

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

IN RE: TONQUIN FISHERIES, INC.

JUDGMENT IN A CIVIL CASE

V.

CASE NUMBER: C92-128(D)M

(Filed Febr. 23, 1994)

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Findings of Fact and Conclusions of Law entered February 10, 1994 that Tonquin Fisheries, Inc.'s petition for exoneration from or limitation of liability is DENIED and DISMISSED. Tonquin Fisheries, Inc. is liable to the Estate of Lawrence Tousignant for all damages caused by the death of Lawrence Tousignant. The Estate of Lawrence Tousignant may file its claim on the issue of damages in any court otherwise having jurisdiction.

February 23, 1994
Date

BRUCE RIFKIN
Clerk

/s/ Wendy Samson
(By) Deputy Clerk

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-0128D MOTION OF TONQUIN FISHERIES, INC., PURSUANT TO RULE 52(b), F.R.C.P., TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT **NOTE FOR MOTION CALENDAR: APRIL 1, 1994** (Filed March 8, 1994)

NOW INTO COURT, through undersigned counsel, comes Petitioner, Tonquin Fisheries, Inc., and, pursuant to Rule 52(b), F.R.C.P., moves this Court for an Order amending this Court's Findings of Fact and Conclusions of Law and Judgment for the reasons more fully set forth in the accompanying memorandum in support of said motion.

DATED this 8 day of March, 1994.

Respectfully submitted,

LE GROS, BUCHANAN & PAUL

By /s/ Clayton G. Ramsey
CLAYTON G. RAMSEY
WSBA #20572
Of Attorneys for Tonquin Fisheries, Inc.

CERTIFICATE OF HAND DELIVERY

The undersigned certifies that on this day she caused a copy of the document to which this certificate is attached to be hand-delivered to C. Steven Fury, attorney for Ymanda Tousignant, as personal representative of the Estate of Lawrence Tousignant, Defendant.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 8th day of March, 1994.

/s/ Frances M. Bellomo
Signed at Seattle, Washington

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-0128D MEMORANDUM OF TONQUIN FISHERIES, INC. IN SUPPORT OF ITS MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT (Filed March 8, 1994)

MAY IT PLEASE THE COURT:

Petitioner, Tonquin Fisheries, Inc. ("Tonquin"), moves this Court to amend its Findings of Fact and Conclusions of Law entered on February 10, 1994, and to amend the Judgment entered on February 23, 1994, to have the Findings, Conclusions and Judgment conform to the issues tried to this Court and the evidence presented at trial. Specifically, all references in the Court's Findings, Conclusions and Judgment relative to the cause of death of Lawrence Tousignant should be stricken. Likewise, the directive in the Findings, Conclusions and Judgment to Ymanda Tousignant, as personal representative of the Estate of Lawrence Tousignant ("Claimant"), that she is free to proceed to file a claim for damages and that the only issue to be tried in such a proceeding is the issue of damages should be stricken.

ARGUMENT

The issue tried to this Court in August 1993 was whether or not Tonquin was entitled to limitation from and/or exoneration from liability for damages arising from the sinking of the F/V TONQUIN on October 13, 1991. The Findings, Conclusions and Judgment entered by this Court greatly exceed the scope of the Court's inquiry and should be amended accordingly. As the Findings, Conclusions and Judgment now stand, Tonquin is precluded from arguing the contributory negligence of the decedent, Lawrence Tousignant, and the applicability of the primary duty doctrine in any subsequent proceeding on damages. Foreclosure to Tonquin on these defenses at a subsequent damage trial is inappropriate and incorrect.

The Claimant was the sole claimant is Tonquin's limitation proceeding. In July, 1993, one month before trial was to begin, the Claimant petitioned this Court, without opposition from Tonquin, to dissolve this Court's stay to permit the claimant to file her damage action in state court. The request was granted, leaving only the issue of limitation of liability to be tried before this Court. The Claimant's petition to dissolve this Court's stay was proper because this was a single claimant limitation proceeding. *Newton v. Shipman*, 718 F.2d 959 (1983). Attached as Exhibit A is this Court's Order of July 21, 1993 submitted by the Claimant's attorney and signed by this Court, specifically ordering that the only issue to be tried on August 2, 1993 was Tonquin's petition for limitation of liability, not damages.

In a limitation of liability action a trial can end in one of three ways: (1) a petitioning shipowner can be wholly exonerated from all liability; (2) a shipowner can be found liable, but upon his proof that he was free of privity and knowledge, he is declared entitled to limit his liability pursuant to 46 U.S.C. § 183; or (3) he can be found not only liable, but affected with privity or knowledge and is declared liable for all damages without benefit of the limitation statute. *Benedict on Admiralty*, § 12.

In this case, the Court found Tonquin liable and that it had privity and knowledge of the causes of the sinking of the F/V TONQUIN and should be liable for all provable damages. The issue now to be tried is damages, and the claimant has expressed her desire to proceed on that issue in state court before a jury. Consequently, this Court heard absolutely no testimony concerning damages or the defenses available to the petitioner on that issue. Despite this, the Court's Findings, Conclusions and Judgment preclude the petitioner from raising that issue in a subsequent damage trial.

This Court's Conclusions of Law No. 15, submitted by the claimant and adopted by this Court, is incorrect. That conclusion states that the only issue remaining to be tried is one on damages. More correctly stated, the issue remaining to be tried is the issue of damages *and* the defenses to that claim, including the decedent's sole or comparative negligence and the applicability of the primary duty doctrine and any other damage defenses available to TONQUIN.

The Claimant intends to proceed on her claim for damages under the Jones Act and for unseaworthiness.

Quite clearly, comparative negligence applies in both Jones Act and unseaworthiness actions, barring an injured party from recovering for the damages sustained as a result of that party's fault. *Miles v. Melrose,* 882 F.2d 1976 (5th Cir. 1989). Tonquin is entitled to assert a defense in the damage claim of the decedent's sole or comparative negligence as it is entitled to raise the primary duty doctrine, which essentially is that a maritime officer aboard a ship who has a duty to maintain ship safety, and whose failure to do so is the "sole" cause of his injury, cannot recover damages for injuries caused by that breach. *Reinhart v. United States,* 457 F.2d 151 (9th Cir. 1972).

The cleverly crafted Findings and Conclusions submitted by the Claimant to this Court for adoption is an attempt to foreclose these and other defenses by having this Court rule that there is no issue to be tried, other than the amount of damages due the Claimant. This is incorrect. While the issue of damages is certainly a matter to be tried, there are defenses Tonquin is entitled to raise to that claim.

In the Matter of the Complaint of Agust Gudjonsson, 500 F. Supp. 78 (W.D. WA 1980), Judge Beeks heard *both* a single claimant limitation of liability action *and* damage trial and, following a trial on the shipowner's claimed entitlement to limitation or exoneration, found that the vessel's sinking and subsequent injury to the claimant was caused by the shipowner's negligence. In that finding, Judge Beeks specifically found that the claimant was not contributorily negligent and scheduled a trial on damages.

In the matter tried before this Court, the decedent's sole or comparative negligence and the applicability of the primary duty doctrine, and any other defenses Tonquin might have on damages, were not heard. Despite this, the Court's Findings, Conclusions and Judgment appear to make these defenses Tonquin will seek to raise *res judicata* by implying that there are no other issues to be tried, other than the amount of damages due the Claimant.

The decedent was the captain of the TONQUIN, and as such, was primarily responsible for its safe operation in compliance with Coast Guard rules and regulations. His failure to do so resulted in his death. This will be shown at a subsequent trial on damages. It was not an issue before this Court. The only issue this Court was presented with was whether Tonquin was entitled to exoneration from or limitation from liability, and whether or not Tonquin had privity or knowledge of the causes of the sinking that would preclude it from claiming limitation.

CONCLUSION

For the foregoing reasons, this Court's Findings of Fact, specifically Findings 16 and 18, and its Conclusions of Law Nos. 5, 7, 8, 9, 10, 11, 14 and 15, should be stricken and the judgment should be amended to omit any reference to Tonquin being liable to the Estate of Lawrence Tousignant for all damages caused by the sinking of the vessel, unless reference is also made to the ability of Tonquin to raise any and all available defenses on the question of damages.

DATED this 8 day of March, 1994.

Respectfully submitted,

LE GROS, BUCHANAN & PAUL

By /s/ Clayton G. Ramsey
CLAYTON G. RAMSEY
WSBA #20572
Of Attorneys for Tonquin Fisheries, Inc.

CERTIFICATE OF HAND DELIVERY

The undersigned certifies that on this day she caused a copy of the document to which this certificate is attached to be hand-delivered to C. Steven Fury, attorney for Ymands Tousignant, as personal representative of the Estate of Lawrence Tousignant, Defendant.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 8th day of March, 1994.

/s/ Frances M. Bellomo
Signed at Seattle, Washington

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-0128D [PROPOSED] ORDER (Filed March 8, 1994)

FOR THE REASONS set forth in the Memorandum in Support of its Motion to Amend Findings of Fact and Conclusions of Law and Judgment, it is hereby

ORDERED that this Court's Findings of Fact Nos. 16 and 18, and its Conclusions of Law Nos. 5, 7, 8, 9, 10, 11, 14 and 15 are stricken, and the judgment is amended to specifically include that Tonquin Fisheries, Inc. is entitled to assert in a subsequent trial on damages all defenses available to it on that issue.

DONE this ___ day of April, 1994.

UNITED STATES DISTRICT
COURT JUDGE

Presented by:

LE GROS, BUCHANAN & PAUL

By /s/ Clayton G. Ramsey
CLAYTON G. RAMSEY
WSBA #20572
Of Attorneys for Tonquin
Fisheries, Inc.

CERTIFICATE OF HAND DELIVERY

The undersigned certifies that on this day she caused a copy of the document to which this certificate is attached to be hand-delivered to C. Steven Fury, attorney for Ymanda Tousignant, as personal representative of the Estate of Lawrence Tousignant, Defendant.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 8th day of March, 1994.

/s/ Frances M. Bellomo
Signed at Seattle, Washington

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-0128D(M) PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW (Filed March 28, 1994)

I. PROCEDURAL HISTORY

This matter was tried in Court without a jury on August 2 and 3, 1993. The Court issued its oral ruling after final argument on August 30, 1993 inviting claimant to submit proposed findings of fact and conclusions of law. Proposed findings and conclusions were submitted on December 2, 1993. The petitioner, Tonquin Fisheries, Inc., objected to the entry of the proposed findings of fact and conclusions of law and submitted its own proposed findings and conclusions. Among its objections were to proposed Finding of Fact 18 and proposed Conclusions of Law 14 and 15.

The Court, after due consideration of the presentations by the parties, amended the proposed findings of fact submitted by the plaintiff in certain regards and

entered them on February 10, 1994. Judgment was entered on these findings and conclusions on February 23, 1994.

II. CURRENT MOTION

On March 8, 1994, thirteen days after the entry of judgment, petitioner filed this motion to amend the findings of fact and conclusions of law and judgment. Again, petitioner objects to Finding of Fact 18 and Conclusions of Law 14 and 15 and other findings and conclusions. This Court has previously rejected petitioner's arguments; petitioner had ample opportunity to make all of its arguments at trial, at final argument and at the time of presentation of the findings and conclusions. For these reasons, and because petitioner's motion is untimely, it must be denied.

III. DISCUSSION

Petitioner's motion on its face is a motion to amend findings of fact and conclusions of law pursuant to Rule 50(d), Federal Rules of Civil Procedure. As it seeks also to amend the judgment, it is pursuant to Rule 59(e). Rule 52(b) states in pertinent part:

> **Amendment.** Upon motion of a party made not later than 10 days after entry of judgment, the court may amend its findings or make additional findings and may amend the judgment accordingly.

Rule 59(e) states:

> **Motion to Alter or Amend a Judgment.** A motion to alter to amend the judgment shall be served not later than 10 days after entry of the judgment.

The 10-day time limits in Rule 52(b) and Rule 59(e) are strict and jurisdictional. After the passage of 10 days, the District Court lacks jurisdiction to grant relief under either rule. *Browder v. Director, Dept. of Corrections of Illinois,* 434 U.S. 257 (1978). As this Court lacks jurisdiction to entertain petitioner's motion, it must be denied.

DATED this 28th day of March, 1994.

FURY BAILEY

/s/ C. Steven Fury
C. STEVEN FURY
Counsel for Plaintiff

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-0128D RESPONSE OF TONQUIN FISHERIES, INC. TO CLAIMANT'S OPPOSITION TO MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT (Filed March 31, 1994)

MAY IT PLEASE THE COURT:

Tonquin Fisheries, Inc. ("Tonquin") has requested this Court, pursuant to Rule 52(b), F.R.C.P., to amend its findings of fact and conclusions of law and judgment entered on February 23, 1994, denying Tonquin's petition for limitation of or exoneration from liability for damages arising out of the sinking of the F/V TONQUIN occurring on October 13, 1991. Specifically, Tonquin has requested the Court to amend its findings and conclusions and judgment to conform to the issue that was heard at trial, i.e., whether or not Tonquin was entitled to limitation or exoneration from liability. This Court's findings and conclusions denying Tonquin limitation went far beyond that and found not only was Tonquin not entitled to limit its liability, but that the vessel's sinking proximately caused

the death of Lawrence Tousignant ("Tousignant"), the vessel captain.

Tonquin submits that the Court's finding regarding the causation of the death of Tousignant exceeded the scope of the Court's inquiry in Tonquin's limitation proceeding. The issue of causation was not before this Court. That issue has specifically been reserved by the claimant for hearing on a trial on damages that the claimant intends to file in Kodiak, Alaska.

Necessarily, a trial on damages will involve an inquiry into the causal connection between the reasons for the sinking of the F/V TONQUIN and the death of Tousignant. As a part of the damage trial, Tonquin intends to raise the defenses, among others, of sole and/or comparative fault of Tousignant with respect to the cause of the sinking of the TONQUIN and whether or not the vessel's unseaworthiness and Tonquin's negligence were the legal causes of Tousignant's death. These are issues that were not before this Court and on which no evidence was presented by Tonquin, yet this Court's findings and conclusions state that the only issues to be tried at a subsequent damage trial will be the amount of damages due the claimant. In this respect, the Court's findings and conclusions and judgment are incorrect and require amendment as suggested by Tonquin in its memorandum submitted in support of its motion to amend the Court's findings of fact and conclusions of law and judgment.

Apparently, the claimant has no opposition to the relief Tonquin requests because the claimant's reply to Tonquin's motion and memorandum neglects entirely the

merits of Tonquin's arguments and erroneously focuses on a legal technicality by suggesting that Tonquin's Rule 52(b), F.R.C.P., motion was untimely and this Court lacks jurisdiction to entertain that motion.

The claimant is plainly wrong. Judgment was entered on the Court's docket on February 23, 1994. Tonquin's Rule 52(b), F.R.C.P., motion was filed on March 8, 1994. Under Rule 52(b), a party has ten days from the entry of judgment to file its motion. While the claimant is correct that the motion was filed 13 days after judgment was entered, the claimant has apparently overlooked Rule 6(a), F.R.C.P., providing that when the period of time prescribed or allowed by the federal rules within which a party is to act is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded from the computation of time. Application of Rule 6 to the timing of the filing of Tonquin's motion reveals that, in fact, Tonquin filed its motion one day before March 9, 1994, the expiration date of its Rule 52(b) deadline.

Tonquin's motion and supporting memorandum not only was timely, but also correctly points out why the relief Tonquin requests should be granted.

CONCLUSION

For the foregoing reasons, the motion of Tonquin to amend this Court's findings of fact and conclusions of law and judgment should be granted.

DATED this 31 day of March, 1994.

Respectfully submitted,

LE GROS, BUCHANAN & PAUL

By /s/ Clayton G. Ramsey
CLAYTON G. RAMSEY
WSBA #20572
Of Attorneys for Tonquin Fisheries, Inc.

CERTIFICATE OF HAND DELIVERY

The undersigned certifies that on this day she caused a copy of the document to which this certificate is attached to be hand-delivered to C. Steven Fury, counsel of record for Plaintiff herein.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 31st day of March, 1994.

/s/ Frances M. Bellomo
Signed at Seattle, Washington

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-128D(M) ORDER DENYING TONQUIN'S MOTION TO AMEND FINDINGS AND CONCLUSIONS (Filed April 1, 1994)

The Court entered its Findings of Fact and Conclusions of Law on February 10, 1994, and Judgment was entered on these findings and conclusions on February 23, 1994. Tonquin's motion is timely; such motion may be brought not later than ten days after entry of judgment, excluding Saturdays, Sundays, and holidays. Fed. R. Civ. P. 52(b), 59(e), and 6(a).

Tonquin petitions the Court to strike Findings of Fact 16 and 18 and Conclusions of Law 5, 7, 8, 9, 10, 11, 14, and 15 and to specifically include that Tonquin Fisheries, Inc. is entitled to assert in a subsequent trial on damages all defenses available to it on that issue. Tonquin specifically desires to assert the decedent's sole or comparative negligence and to raise the "primary duty doctrine": a maritime officer aboard a ship who has a duty to maintain ship safety, and whose failure to do so is the

"sole" cause of his injury, cannot recover damages for injuries caused by that breach. *Reinhart v. United States*, 457 F.2d 151 (9th Cir. 1972).

The matter of asserting comparative negligence defenses on the issue of damages was addressed in the parties' earlier arguments on Conclusions of Law 14 and 15. Tonquin may not assert the contributory negligence of Lawrence Tousignant in defense of the damage claim because the Court has found that violation of safety statutes, specifically Coast Guard regulations concerning bilge alarms and lights on survival suits contributed to the sinking of the vessel and/or the death of Lawrence Tousignant. *See* 46 U.S.C. Appx. § 688 and 45 U.S.C. § 53.

DATED this 1st day of April 1994.

/s/ Walter T. McGovern
WALTER T. McGOVERN
UNITED STATES
DISTRICT JUDGE

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-0128D(M) ORDER ON PLAINTIFF'S MOTION TO DISSOLVE STAY (Filed July 15, 1994)

The court has heard and considered the plaintiff's motion to dissolve stay and to permit filing of a claim at law. There is a single claimant in this matter and the claimant has made the required stipulations. The court finds that the plaintiff's motion is meritorious and should be granted. According, it is

ORDERED that the order of injunction entered by the court on January 31, 1992, be, and is hereby, dissolved. It is further

ORDERED that the claimant be, and she is hereby permitted to file an action to prosecute her claim against the vessel owner. It is further

ORDERED that this court retains exclusive jurisdiction to hear and determine the issues of limitation of liability. It is further

ORDERED that the issues of limitation of liability only will be heard and tried by this court at trial on August 2, 1993.

DATED this 21st day of July, 1993.

/s/ Walter T. McGovern
WALTER T. McGOVERN
United States District Judge

Presented by

FURY BAILEY

/s/ C. Steven Fury
C. STEVEN FURY
Counsel for Claimant

HONORABLE WALTER T. McGOVERN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In the Matter of the Complaint of TONQUIN FISHERIES, INC., a Washington corporation, owner of the F/V TONQUIN, Official Number 529425, for Exoneration From or Limitation of Liability, Plaintiff.	IN ADMIRALTY NO. C92-0128D(M) CLAIMANT'S MOTION TO DISSOLVE STAY TO PERMIT FILING OF CLAIM AT LAW Note on Calendar: Friday, July 30, 1993 (Filed July 15, 1993)

RELIEF REQUESTED

The claimant requests that the court enter an order dissolving or modifying an injunction entered by the court on January 31, 1993, permitting the claimant to file and prosecute a claim at law against the plaintiff for damages arising out of the sinking of the F/V TONQUIN.

The claimant further requests that at the trial of this matter on August 2, 1993, the only issues that will be heard and determined will be the issues of limitation of liability.

GROUNDS FOR RELIEF

Claimant bases her motion on the Limitation of Liability Act, 46 U.S.C. §183 et seq., and upon the discussion and authorities cited below.

DISCUSSION

This is a limitation of liability proceeding brought by the plaintiff pursuant to 46 U.S.C. §183 et seq. Pursuant to that statute, this Court entered an injunction preventing claimant from filing an action against the plaintiff or its property with respect to the sinking of the F/V TONQUIN and requiring that any claims against the limitation fund be filed by March 16, 1992.

The period for filing claims has now come and gone and there is but a single claim filed in this court. The claimant is Ymanda Tousignant, the widow and the personal representative of the Estate of Lawrence Tousignant. Since there is but one claimant, she now requests this court to dissolve or modify the stay to permit her to file a civil action pursuant to the Jones Act, 46 U.S.C. §688, and proceed with such a case before a jury.

This is not the first notice to the plaintiff of her desire to proceed with a jury. In her Memorandum in Opposition to permit the Filing of the "Counterclaim", at p. 2, ll. 1-24, the claimant stated:

> Once the court finds fault on the part of the vessel owner, Ymanda Tousignant will ask the court to lift the stay and permit her to proceed

with her lawsuit for damages which she will file in her own community.

In her claim, claimant demanded a jury.

The required stipulations are filed contemporaneously herewith. In those stipulations, claimant acknowledges the court's right to try the limitation features of the petition and waives any claim of res judicata relevant to the issue of limited liability based upon any judgment obtained in the jury trial.

The procedure outlined by the Supreme Court in *Ex parte Green*, 286 U.S. 437 (1932) and *Lagnes v. Green*, 282 U.S. 531 (1931) and by the Ninth Circuit Court of Appeals in *Newton v. Shipman*, 718 F.2d 959 (1983), provide this court is to dissolve or modify the stay and permit the claimant to file and proceed with her action at law.

The court has the flexibility to determine order in which the actions should proceed. Generally it is true that the action at law would proceed first and the limitation action would be held in abeyance. The procedure may be reversed with the limitation issues tried first. *In Re DOUBLE D Dredging Company*, 467 F.2d 468 (5th Cir. 1972). Whether the limitation is to wait for trial of the liability issue or to precede [sic] first is within the District Court's discretion. *Newton v. Shipman, supra*, 718 F.2d 963-4.

In this case, as the limitation matter is set for trial on August 2 and the parties are prepared to proceed at that time, the claimant proposes to the court that the limitation issues only be tried on August 2, 1993. The claimant should be permitted to file her action at law pursuant to 46 U.S.C. §688 and to proceed with her damages claim before a jury.

This is not the first notice to the plaintiff of her desire to proceed with a jury. In her Memorandum in Opposition to the Filing of the "Counterclaim" the claimant stated:

> Once the court finds fault on the part of the vessel owner, Ymanda Tousignant will ask the court to lift the stay and permit her to proceed with her lawsuit for damages which she will file in her own community.

In her claim, claimant demanded a jury.

CONCLUSION

Claimant respectfully requests that, since she is the sole claimant in these proceedings, the court dissolve the stay, permit her to file an action at law pursuant to the Jones Act against the plaintiff, and proceed to trial solely on the limitation issues on August 2, 1993.

DATED this 15th day of July, 1993.

/s/ C. Steven Fury
C. STEVEN FURY
Counsel for Claimant

46 U.S.C. § 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy

(1) No action may be maintained under subsection (a) of this section or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action if the incident occurred –

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of off-shore mineral or energy resources – including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person –

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

(As amended Dec. 29, 1982, Pub.L. 97-389, Title V, § 503(a), 96 Stat. 1955.)

---

46 C.F.R. § 25.25-13 Personal flotation device lights.

(a) This section applies to vessels described in § 25.25-1 that engage in ocean, coastwise, or Great Lakes voyages.

(b) Each exposure suit carried in accordance with § 25.25-5(e), each life preserver, each marine buoyant device intended to be worn, and each buoyant vest must have a personal flotation device light that is approved under subpart 161.012 of this chapter.

(c) Each personal flotation device light required by this section must be securely attached to the front shoulder area of the exposure suit, life preserver, or other personal flotation device.

(d) if a personal flotation device light has a non-replaceable power source, the light must be replaced on or before the expiration date of the power source. If the light has a replaceable power source, the power source must be replaced on or before its expiration date and the light must be replaced when it is no longer serviceable.

(44 FR 38783. July 2, 1978, as amended by CGD 82-076a. 49 FR 4483, Feb. 7, 1994)

---

46 C.F.R. § 28.250 High water alarms.

On a vessel 36 feet (11.8 meters) or more in length, a visual and audible alarm must be provided at the operating station to indicate high water level in each of the following normally unmanned spaces:

(a) A space with a through-hull fitting below the deepest load waterline, such as the lazarette;

(b) A machinery space bilge, bilge well, shaft alley bilge, or other space subject to flooding from sea water piping within the space; and

(c) A space with a non-watertight closure, such as a space with a non-watertight hatch on the main deck.